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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-499

GEORGE R. WILLIAMS, et al.,

Petitioners,

vs.

PACIFIC MARITIME ASSOCIATION, a non-profit corporation, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, and unincorporated association, and I.L.W.U. LOCAL No. 10,

Respondents.

MOTION OF TEAMSTERS FOR A DEMOCRATIC UNION, INDEPENDENT SKILLED TRADES COUNCIL, UNION WOMEN'S ALLIANCE TO GAIN EQUALITY, THE BELL WRINGER, NATIONAL LABOR LAW CENTER OF THE NATIONAL LAWYERS' GUILD AND ASSOCIATION FOR UNION DEMOCRACY, INC. FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

AND

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

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Respondents.

Motion of Teamsters for a Democratic Union, Independent Skilled Trades Council, Union Women's Alliance to Gain Equality, The Bell Wringer, National Labor Law Center of the National Lawyers Guild, and Association for Union Democracy, Inc., for Leave to File Brief as *Amici Curiae* in Support of Petition for Certiorari.

Teamsters for a Democratic Union, Independent Skilled Trades Council, Union Women's Alliance to Gain Equality, The Bell Wringer, National Labor Law Center of the National Lawyers' Guild, and Association for Union Democracy, Inc., a non-profit corporation, move the Court for leave to file the attached brief, as amici curiae, in support of the above captioned Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, as provided in Rule 42 of the Rules of this Court.

The consent of the attorneys for the petitioners has been obtained but the attorneys for the respondents have refused to consent to the filing of such a brief by the six movants.

Movants, as organizations devoted to the protection of employees, are concerned with the impact of the decision below upon the rights of employees and, in particular, upon employees' freedom of speech and association. Because of that impact, movants submit that they are entitled to file a brief in support of the Petition for Certiorari.

WHEREFORE, the six movants named above pray the Court for leave to file the attached Amicus Curiae Brief in Support of the Petition for Certiorari herein.

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BRIEF OF TEAMSTERS FOR A DEMOCRATIC UNION, INDEPENDENT SKILLED TRADES COUNCIL, UNION WOMEN'S ALLIANCE TO GAIN EQUALITY, THE BELL WRINGER, NATIONAL LABOR LAW CENTER OF THE NATIONAL LAWYERS GUILD AND ASSOCIATION FOR UNION DEMOCRACY, INC., *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI.

Interest of *Amici*

Teamsters for a Democratic Union (or "TDU") is a North-America-wide reform movement within the Teamsters' Union. It has 8000 dues-paying members organized in 40 chapters in the United States and Canada. Its members are members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, who seek reform and democracy within their Union and better representation in collective bargaining.

TDU's objectives are democratic unionism and better protection for the rights of working people everywhere.

As presently structured, TDU is the product of a merger between two reform groups composed of rank-and-file members of the Teamsters' Union: PROD, or the Professional Drivers' Council and Teamsters for a Democratic Union. Both organizations sought union reform and democracy. The merged organization kept the name of the latter organization and adopted the common objectives and purposes of both. It publishes a monthly newspaper, *Convoy Dispatch,* which advocates democratic reform in trade unionism generally and in the Teamsters' Union in particular.

The Independent Skilled Trades Council (or "ISTC") is a rank-and-file caucus composed of more than 6000 members of the United Automobile Workers of America, who work at machine maintenance and repair, as model makers, engineers, millwrights, electricians, carpenters, and at other skilled trades. Its purposes are to work for greater democracy within the Union and for better representation of workers in the industry and in particular of the workers in the skilled trades.

Union Women's Alliance to Gain Equality (or "Union WAGE") is an organization of more than 300 working women, including housewives and those unemployed, retired or on welfare, in the San Francisco area. It fights discrimination on the job, in the unions, and in society. It is dedicated to achieving equal rights, equal pay and equal opportunity for women workers and to building an organization that will properly represent women on a national level. It fights for union democracy and for better union representation of women workers. It publishes a newspaper, *Union WAGE,* which has some 2000 subscribers nationwide.

The Bell Wringer is a group of telephone workers, members of Local 1101, Communication Workers of

America, in New York City, which publishes (and is organized around) a non-commercial newspaper, for fellow employees, of the same name. Approximately 30 members of The Bell Wringer participate in the preparation of each issue. The Bell Wringer's objectives are greater union democracy, protection of the rights of rank-and-file union members, and better union representation.

The National Labor Law Center of the National Lawyers' Guild (or "Center") is a project of the National Lawyers' Guild, a 6000-member organization of lawyers, legal workers, law students and others founded in 1937. The Center was founded in 1980 and is supervised by the Guild's National Labor Executive Committee. It is a non-profit legal and educational organization. It maintains a referral network of labor lawyers and a clearinghouse of information and research on current developments in labor law. It develops educational and training materials for lawyers and labor activists, provides some litigation and counseling services and publishes a journal, *Labor Update*. Its purposes are to assist the efforts of workers to build unions where there are none and to strengthen and democratize their organizations.

The Association for Union Democracy, Inc. (or "AUD") is a non-profit corporation organized in 1969, registered with the Internal Revenue Service as a tax-exempt organization since 1971 and subsequently classified as a non-private foundation. Its purpose is to further democratic principles and practices within labor organizations by encouraging union members to participate actively in the internal life of their unions and by protecting the exercise of their democratic rights within their unions. Its founders and sponsors include persons who are or have been leaders of labor unions, religious leaders concerned with social justice, members of union public review boards, lawyers, and labor educators.

The *amici* share a common concern in this case over the impact of the decision below upon the rights of employees to exercise their freedom of speech and association within their unions and among their fellow workers. The *amici curiae* consider that freedom on the part of workers is fundamental to any democratically-responsible system of industrial self-government. The *amici* look upon the Labor Movement as one of the great forces which help sustain democracy in our national life but one which, if it is to serve this purpose effectively, must itself be democratic in its internal organization.

At the same time, the *amici* recognize that the freedom of workers is threatened by the power of union officials and their management counterparts to take reprisals upon rank-and-file activists whom the officials regard as "dissidents" and "troublemakers." Especially is this true where union and management, in close collaboration with each other, stand toward employees as an awesome monolith, threatening to destroy the livelihood of any worker who, by outspoken expression of views, might earn "Big Brother's" displeasure.

The decision below upholds, as a non-breach of the bargaining representative's duty of fair representation, an agreement between Union and employer to discharge and exclude from further employment all employees whom the records available to both show to have committed certain offenses. It happens that the offenses were, at the time they were committed, either non-offenses altogether or punishable only by penalties far less severe than discharge. Hence, imposition of the sanction of discharge therefor is patently unjust. But the seriousness of the issue is far greater than that. The power of union officials and management officials jointly to "target" specific persons for discharge by specifying a class that will include them—a power upheld by the Court below—threatens all employees and, most of all, threatens those who have earned the label of "dissidents." In particular, it threat-

ens those who have openly joined and urged fellow employees to join such rank-and-file groups as the *amici*, TDU, and ISTC, and Union WAGE and The Bell Wringer; or employees who have challenged the "sweetheart" relations and agreements between corrupt union officials and their equally corrupt management counterparts; or those who, like the members of Union WAGE, have incurred hostility because of their defense of the rights of women workers.

Because the decision below gives to management and union officials a new device for getting rid of such "dissidents," it helps to chill the exercise of employee freedom of speech and association. In order to dispel that chill and protect the rights of employees, the *amici* urge that certiorari be granted and the decision below be reversed.

Questions Presented

1. Whether a collective bargaining representative breaches its duty toward employees represented by it when it agrees with an employer to discharge and exclude from future employment those employees who have in the past committed certain offenses, which offenses at the time they were committed were either not punishable at all or were offenses for which the maximum punishment was a lesser penalty.

2. Whether a bargaining representative breaches its duty by agreeing with the employer to discharge and exclude from future employment all employees who are members of a class of persons who are shown by records available to have committed certain violations in the past.

3. Whether the discharge or deregistration of employees for offenses which were not punishable by such sanction at the time they were committed is a violation of a bargaining agreement forbidding discharge without cause.

Statement of the Case

The 51 petitioners were, from 1959 to 1963, full-time non-probationary longshoremen, working as such in the Port of San Francisco, pursuant to a collective bargaining agreement between the employers' association ("PMA") and the unions, International Longshoremen's and Warehousemen's Union ("ILWU") and its Local 10. They were registered as "B men" under the machinery established by the agreement. As "B men" they were entitled to seek whatever longshore work remained unfilled after the "A men," who were members of Local 10, had taken such jobs as they wanted (A-83). The "B men" were not allowed to hold any other employment without permission (A-105) and were required to work or be available for work 70% of each 30-day period (A-87).

The bargaining representative for both "A men" and "B men" was Local 10 and its parent ILWU, but only "A men" were admitted to membership in it. The "B men" were denied membership.

The rules governing "B men" were determined by the "A men" who were members of Local 10 (A-84).

The rules governing hiring hall procedures (A-87 to A-88, A-90 to A-95) established maximum penalties for various infractions (A-88, A-95). Thus while certain violations of the rules (e.g. pilferage) called for automatic deregistration, the maximum penalty for the first offense of intoxication was a 30-day suspension (A-88) and the maximum penalties for first and second hiring hall (or "Low-Man-Out") offenses were a 30-day and a 6-month suspension, respectively (A-95).

The rules establishing the maximum penalties for Low-Man-Out violations concluded with the statement that these were the only and official rules on the low-man-out system, that if new rules or changes are needed they would

be issued by the Committee, and that "THERE ARE NO OTHER RULES." (A-95).

"B men" were required to pay $6 per month pro rata for support of the hiring hall. There were no official rules penalizing lateness, but it was the custom for each man who paid late to add a $1 per day surcharge for lateness.

In 1958, a Memorandum was prepared (A-104 to A-106) setting forth the ten types of conduct that could cause deregistration. These ten types of conduct did not include intoxication, or Low-Man-Out violations, or lateness in paying pro rata.

No new penalties were adopted until 1963.

In 1963, Local 10 and PMA agreed to and adopted certain "standards" for promotion of persons from "B" to "A" status (A-98). These standards denied promotion to any "B men" who were shown by the records in possession of Local 10 and PMA to have committed 10 or more hours of Low-Man-Out violations, or to have paid pro rata late eight or more times, or to have failed to meet the 70% availability requirement for any 30-day period or to have been found guilty of any intoxication offense.

However, Local 10 and PMA did not merely deny promotion to those "B men" who were barred from it by the new standards." In addition, they agreed to "deregister" all such "B men" from future employment. They did not consult the "B men" before so agreeing.

As a result, 82 "B men," including the 51 petitioners, each of whom had worked for four years or more as a longshoremen under the agreement between PMA and ILWU, and who had held no other job during that period, were discharged and permanently barred from employment as longshoremen.

The deregistered "B men" grieved their deregistrations through the same labor organization that, as their representative, had agreed to the deregistration of those "B men" who did not meet the "standards" for promotion. Their grievances were decided and acted upon by the same union-employer joint committee that had adopted the "standards" and decided upon the deregistrations.

They thereafter brought suit in federal court charging ILWU and Local 10 with breach of their duty of fair representation, charging PMA wtih complicity in such breach, and charging PMA with breach of the collective bargaining agreement; their complaint sought either promotion to "A" status or restoration of plaintiffs' "B" registration and damages. After trial in District Court on the issue of liability, the District Court accepted *in toto* defendants' proposed findings and conclusions and entered judgment dismissing the action (A-27 to A-77, A-78 to A-79). Plaintiffs appealed but the Court of Appeals affirmed (A-1 to A-26).

POINT I

A bargaining representative breaches its duty of fair representation when it agrees to the discharge of employees for offenses which, when committed, were either not offenses at all or were punishable only by far less severe penalties.

In our system of industrial relations, the collective bargaining agreement and the bargaining relationship that underlies it are part of an effort "to erect a system of industrial self-government." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 575, 580 (1960). That system is of "a governmental nature"; *Ibid.* Its day-to-day performance is governed by "a new common law—the common law of a particular industry or of a particular plant," derived from the bargaining agreement. *Ibid,* 363

U.S. at 579. But underlying that "new common law" is a more fundamental, quasi-*constitutional* law of industrial self-government, expressed primarily in the statutory power of the bargaining representative to represent all employees in the bargaining unit and in the representative's commensurate statutory duty to represent all employees "honestly and in good faith and without invidious discrimination or arbitrary conduct." *Cf.: Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 570 (1976); *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967). As this Court has repeatedly emphasized, that duty must serve as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of the federal labor law"; *Vaca* v. *Sipes, supra*, 386 U.S. at 182; *Hines, supra*, 424 U.S. at 564.

The statutory power of a bargaining representative and the commensurate duty imposed upon it by statute comprise a basic law of industrial self-government that is quasi-constitutional in two respects: first, it is the constitutional law of industrial self-government, analogous to that of Constitutional government; and, second, it is shaped by Constitutional imperatives. If Congress, having conferred upon the bargaining representative the power to represent all employees in a bargaining unit, had failed to impose a commensurate statutory duty upon the representative toward those employees then, as this Court has noted, "constitutional questions [would] arise." *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, 198 (1944). "For," as this Court went on to explain,

> ". . . the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights."

The duty imposed upon the bargaining representative is therefore similar to that imposed upon a legislature—and at least as strict.[1] In finding that the Railway Labor Act imposed such a duty upon a bargaining representative, this Court described that duty, *Ibid.*, 323 U.S. at 202, as

> ". . . at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates."

And, of course, a similar duty is imposed upon representatives by the National Labor Relations Act; *Wallace Corp.* v. *NLRB,* 323 U.S. 248, 255-56 (1944).

Among the protections embraced within the duty of fair representation—and, thus, among the quasi-constitutional limitations upon the power of a bargaining representative's power to deny, restrict, destroy or discriminate against the rights of employees whom it represents—are industrial versions of the basic constitutional protections against double jeopardy and against ex post facto laws. Such protections have long been recognized, by the arbitration decisions, as part of the "common law" established by the bargaining agreements. *Cf.* Elkouri and Elkouri, *How Arbitration Works,* 3rd Ed. 1973, pp. 636-638(double jeopardy); 641-643 (requirement that employees have knowledge of a rule at the time of the alleged violation). As Arbitrator Stanley H. Sergent has noted in *Marley Cooling Tower Co.,* 71 LA 307, 313 (1978),

> "A fundamental concept relative to the validity of any plant rule is that employees must have knowledge that such a rule exists."

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[1] The protections embraced within that duty are procedural as well as substantive; they include the right of notice and hearing; *cf. Ibid.,* 323 U.S. at 204. The representative here accorded no such rights to the "B men" before agreeing to the deregistration. And the grievance hearings conducted *after* such agreement were neither fair nor impartial. See *infra,* page 18.

And compare: *Shenango, Inc.,* 67 LA 867 (1976; Arbitrator Sidney L. Cahn). Such protections are inherently within the "common law" of the industry or plant, since they are necessarily among the quasi-constitutional limitations upon the power of a bargaining representative to bargain on behalf of employees.

Here, the bargaining representative exceeded those limitations and violated its duty to the employees it represented by agreeing with the employer to punish with the supreme penalty of deregistration—or with what has appropriately been termed "the industrial equivalent of capital punishment"; *Griffin* v. *UAW,* 469 F.2d 181, 183 (4th Cir. 1972); *Miller* v. *Gateway Transp. Co., Inc.,* 616 F.2d 262, 277, fn. 12 (7th Cir. 1979)—violations, in the past, of newly-adopted "standards" of employee conduct, even though the actions charged as violations either were not, at the time they were committed, violations of any rule at all or were violations for which the maximum penalty, at the time they were committed, was a suspension of limited duration.

Thus Ellis E. Graves had committed one instance of intoxication in 1960. The maximum penalty for a first intoxication offense, prescribed by the rules in force at that time, was a 30-day suspension (App. A-88). Upon his commission of the offense, Graves was, in 1960, duly suspended for 30 days, and returned to work. He never committed any other offense. But the "standards" adopted in 1963 called for deregistration of any "B man" who had in the past been found guilty of an instance of intoxication. At the time they were adopted, the records clearly revealed Graves's offense and punishment. Hence the bargaining representative and the employer knew, or could easily discover, at the time they agreed to the 1963 "standards," that Graves would be deregistered in consequence.

It follows that, as to Graves, the representative violated its duty by subjecting him twice to jeopardy and punishment for the same offense and by imposing upon him a punishment greater than that called for by the rules in force at the time the offense was committed.

Similarly, Ulysses Hawkins, during the years from 1959 to mid-1963, paid his pro rata late nine times. Such late payment was not forbidden by any rule or custom. However, it was the custom for anyone who paid late to add a $1-per-day surcharge or penalty. Hawkins did, and the fact was recorded in the hiring hall's records. But in 1963, the newly-adopted "standards," agreed to by the bargaining representative, called for the deregistration of any "B man" who had paid late eight or more times. Hence Hawkins, like Graves, was deregistered. In thus agreeing to deregister him the bargaining representative punished him a second time for an "offense" for which he had already been penalized and imposed upon him punishment for conduct which was not an offense at all, and not punishable at all (except by $1-per-day surcharge) at the time it was committed.

And likewise, Antonio Cafeterio, on Sunday, August 12, 1962, was absent from the hiring hall. The next day, relying upon the informal "Sunday rule," excusing unavailability on Sundays, Cafeterio went to work without penalizing himself by adding hours to his time. That was his only offense and it was entirely innocent. The maximum penalty for a first Low-Man-Out offense, under the rules in force at the time, was a 30-day suspension (A-95); the rules plainly said that these were the *only* rules regarding Low-Man-Out—and, in capital letters, "THERE ARE NO OTHER RULES" (A-95). Nevertheless, the "standards" adopted in 1963 (A-98) called for deregistration of all "B men" who had committed 10 or more hours of Low-Man-Out violations, a class of which the records revealed Cafeterio to be a member.

If it be true that the duty of fair representation expresses, in the area of industrial self-government, the rough equivalent of Constitutional limitations upon a legislature to deny, restrict, destroy or discriminate against the rights of those for whom it legislates then a bargaining representative's agreement, with the employer's association, to impose a second punishment for a single offense upon an employee who has already been punished for that offense is a violation of that duty. And similarly, a bargaining representative's agreement with the employer to impose the punishment of discharge or deregistration upon an employee for an offense which, at the time it was committed, was either no offense at all or else an offense whose maximum punishment was a penalty far less severe than discharge, is likewise a violation of that duty.

It follows that the punishments of deregistration imposed upon petitioners here were a breach of the bargaining representative's duty toward those petitioners.

It is no answer to say that the "B men" were told in a 1958 Memorandum[2] that a union-employer joint committee could (assuming the Union's agreement to do so) deregister them ". . . for any other cause." Similarly,

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[2] See Opinion below, at A-19 to A-20. Section 9 of the 1958 Memorandum is given in full in the decision of the Unemployment Insurance Appeals Board at pages A-104 to A-106. The Memorandum lists, in ten numbered paragraphs, the types of misconduct that might cause deregistration before going on, in the eleventh paragraph, to add "Or for any other cause."

It is worth noting that the ten types of misconduct listed in the Memorandum did *not* include either intoxication or Low-Man-Out violations or lateness in paying pro rata. The necessary implication is that the maximum penalties for such offenses, as specified in the existing rules, were in fact the maximum penalties for any violation committed prior to such time as the existing rules were amended. And these did not permit deregistration for a first intoxication offense (A-88), or for a first or second Low-Man-Out offense (A-95) or for lateness in paying pro rata.

it is no answer to say that upon initially applying for registration, each "B man" was required to sign a letter acknowledging that his registration "shall be subject to agreements between PMA and ILWU" and that "registration may be revoked in accordance with such agreements and such rules . . . hereafter agreed upon or adopted by the Association and the Union. . . ." There is no reasonable way in which that can be interpreted as authorizing the bargaining representative to agree to deregistration of employees by retroactive application of new "rules" or "standards". What is at issue here is precisely the representative's agreement, in 1963, to such deregistration for prior conduct.

No objection is made here to the power of the union and employer to adopt new rules that prohibit specified conduct and punish any violation of those rules committed in the future. What is objected to is the bargaining representative's agreement to have newly-adopted punitive rules or "standards" applied retroactively to the past conduct of employees it represents. In agreeing to such retroactive application, the representative violates its duty toward those employees. And no pre-hire letter or Memorandum can nullify that duty or absolve the representative from its violation.

POINT II

The union's agreement to deregistration of petitioners was a bill of attainder and thus a violation of its duty of fair representation.

In 1963, at the time that Local 10 and ILWU agreed to the new "standards" and agreed, also, to deregister those "B men" who failed to meet those "standards" because of conduct prior to their adoption, the identities of those persons who would thereby be deregistered were either known or were easily ascertainable from records in the bargaining representative's possession.

Thus it was known or could easily be learned from the records that Graves had been found guilty of an instance of intoxication in 1960 and had been suspended for 30 days as punishment. It was known or could easily be learned from the records that Hawkins had paid his pro rata late nine times between 1959 and 1963. And it was known or could easily be learned from the records that Cafeterio had, however innocently, committed a Low Man Out violation in 1962 of more than ten hours by failing to add hours to his time for his unavailability on Sunday, August 12.

The decision to deregister the class of persons who were shown by the records to have committed any violations of the "standards" was, in short, a bill of attainder. Nor can the seriousness of this fact be easily exaggerated. By approving the bill of attainder that was adopted by ILWU and PMA, the decision below invites unions and managements everywhere to adopt similar bills of attainder, for whatever purpose. Most significantly, it invites those union officials and their management counterparts desiring to get rid of employees whom they consider to be "dissidents" to search the records available to them to find some way of specifying or describing a class of persons that will include one or more of the leading "dissidents." One way of doing so is to specify the class of persons who have performed some particular type of conduct which the "dissident" has been found to have performed. Then, by adopting "standards" that exclude from further employment all members of the class, they will exclude the "dissidents." The process is easy to implement and need display no outward sign of the animus behind it—and hence need give the victimized employee no opportunity to prove actual hostility or discrimination.

Even where the bargaining representative has not sought to target specific persons, its participation in the process of selecting them for discharge compromises its ability to

perform its duties as bargaining representative on behalf of the grieving dischargees. Thus, in this case, in order to grieve their discharges, the 82 "B men" had to go to the union that had already agreed to deregistration of the class of persons of which they were members, and to the joint committee of PMA and ILWU officials who had participated in the process. As the court below noted (at A-14, fn. 13),

> "Those persons representing PMA and ILWU during the grievance proceedings had either participated in deregistering the appellants or had voiced opinions on their cases. It is unlikely that such persons could be entirely fair or impartial. This lack of neutrality in the adjudicating bodies renders exhaustion of remedies futile."

The decision below places "dissident" employees at the mercy of their adversaries in authority. It chills the freedom of employees to express views critical of the union officials or of the latter's relations with employers. It chills also their freedom to join and to urge fellow-employees to join such groups as the *amici,* TDU and ISTC and Union WAGE and Bell Wringer, in order to work through them for union democracy, for better bargaining representation, for advancement of their skilled craft, or for equality for women in employment. The decision below does, in short, all the harm that the Framers of our Constitution feared from the legislative power to adopt bills of attainder—and which moved them to curb such power.

The fact that Graves, Hawkins, Cafeterio and the other petitioners were not specifically named in the bill of attainder is, of course, irrelevant; *cf. United States* v. *Brown,* 381 U.S. 437, 461 (1965). And the punishment imposed upon them was substantially the same as that imposed by other bills of attainder that have been struck down by this Court. In *Cummings* v. *Missouri,* 4 Wall 277 and *Ex Parte Garland,* 4 Wall 333 (1866), the bills of attainder

that were struck down by this Court barred from the practice of specific professions persons who, having taken part in the Rebellion, could not truthfully take an oath that they had not. In *United States* v. *Lovett,* 323 U.S. 303 (1946), the bill of attainder barred payments of federal salaries to three named persons. In *Brown, supra,* the bill of attainder barred all persons who had within the past five years been members of the Communist Party from holding union office. And the vice of the attainder here—namely, that it specifies a class whose members' identities were known or easily ascertainable at the time it was adopted—is the same as the vice of the bills of attainder previously struck down by this Court.

If the power to adopt a bill of attainder be placed in the hands of a legislature, then

> ". . . no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense."
>
> (A. Hamilton, quoted in United States v. Brown, supra, 381 U.S. at 444.)

If such power be placed—as it is placed by the decision below—in the hands of a collective bargaining representative, it has like effect. For when the representative has power to exclude a specific class of easily identifiable persons from further employment, then no employee can be safe nor know when he may be the innocent victim of union officials unsympathetic to his views. The name of liberty applied to such a system of industrial self-government ". . . would be a mockery of common sense."

The bills of attainder that Hamilton referred to, and those struck down by previous decisions of this Court, were adopted by legislatures. The bill of attainder at issue here was adopted by a bargaining representative, jointly with employers. That, of course, is a distinction. But if, as this Court said in *Steele, supra,* the limitations

imposed by Congress upon the powers of a bargaining representative are "at least as exacting . . . as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates," then any difference disappears from the distinction.

It follows that the bargaining representative's violation of the limitations placed by Congress upon its power in regard to employers it represents entitles the petitioners to relief in accordance with the courts' traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative. See: *Vaca* v. *Sipes, supra,* 386 U.S. at 183.

A bill of attainder inflicts punishment. In judging the legality of the attainder, however, it is not necessary to inquire whether it is retributive. The Constitutional ban upon bills of attainder, set forth in Article I, §§ 9 and 10 of our Constitution, is not restricted to instances of retribution. *United States* v. *Brown, supra,* 381 U.S. at 458. Similarly, it is not necessary to find hostility or malice to find a violation of the representative's breach of its duty of fair representation; it is sufficient that the representative's actions be arbitrary. *Vaca* v. *Sipes, supra,* 486 U.S. at 190, *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. at 570. And here the representative's actions plainly were arbitrary. Indeed, when we speak of a bill of attainder we are speaking of precisely the kind of arbitrariness that characterizes a breach of the duty of fair representation.

POINT III

Retroactive application of the "standards" violates the bargaining agreement.

It is well established that, where a labor organization fails to protect an employee's rights under a bargaining agreement, the employee himself may bring suit. *Smith*

v. *Evening News Association,* 371 U.S. 195 (1962); *Hines* v. *Anchor Motor Freight, Inc., supra.*

Such a claim was made by petitioners here. The District Court appears to have dismissed that claim on the strength of a Conclusion (#7; A-74) to the effect that "[t]he explicit promotion standards" were authorized by and adopted in accordance with the bargaining agreement. The Findings say nothing about whether the retroactive application of those "standards" for purposes of *de*-registering employees was authorized by, or adopted in accordance with, the agreement.

Similarly, the Court of Appeals upheld dismissal (A-25 to A-26) on the ground that § 17.851 of the agreement provides that "[m]ore stringent rules and penalties than those provided hereinabove . . . may be adopted or modified by . . . the Joint Coast Labor Relations Committee and . . . shall be applicable" (A-25). It concluded (A-26), that

> "Because the 1963 Rules were adopted pursuant to the explicit procedures provided in the [agreement], enforcement of them to deregister applicants did not breach the collective bargaining agreement."

That holding contains an obvious *non sequitur.* Power to adopt new rules for prospective application obviously does not imply power to apply them retroactively. Both courts held that PMA and the unions had that power without, apparently, addressing that question seriously.

The rules that were in existence prior to adoption of the 1963 "standards" provided that the maximum penalty for the first intoxication offense or the first two Low-Man-Out offenses was to be a suspension of specifically-limited duration. They provided no penalty for lateness in paying pro rata, although custom called for a $1 per

day surcharge. It was understood that no heavier penalty for such offenses could be imposed. In the case of Low-Man-Out violations, the Rules made this explicit. After stating the maximum penalties, the Rules concluded (A-95),

> "These are the only and official rules on the low-man-out system as revised by the Labor Relations Committee up to December 30, 1958. If new rules or changes are needed they will be issued by the Committee.
>
> THERE ARE NO OTHER RULES."

And they remained the only and official rules until adoption of the "standards" in 1963.

There were no other rules, prior to the adoption of the "standards" in 1963, authorizing deregistration of longshoremen for the offenses of intoxication, Low-Man-Out violations or lateness in pro rata payments. The bargaining agreement prohibited discharge of any "B man" except for "cause." Since the rules in force did not permit discharge for the offenses in question, it is clear that those offenses were not "cause."

None of the 82 "B men" was validly deregistered for violation of any of the rules existing *before* the "standards" were adopted, or for any offense committed *after* the "standards" were adopted. It follows that the 82 "B men" were deregistered without "cause" and therefore in violation of the bargaining agreement.

CONCLUSION

For the foregoing reasons, the undersigned submits that the Petition for Certiorari should be granted.

Respectfully submitted,

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